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Environmental liability enforcement in bankruptcy



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What has happened?

- Business operation
 - > parent company in one country
 - > subsidiary conducts business in another country
 - > subsidiary causes environmental damage
 - > huge sanctions and liabilities
 - > subsidiary's bankruptcy
 - > need to prioritize environmental damage in bankruptcy?
 - > need to find additional parties liable?

Prioritizing environmental claims

- Finnish hot topic
 - Ongoing discussion, started on 2016
- Two constitutional rights in conflict
 - Protection of property vs. right to environment
- Current legal situation is complex
 - Bankruptcy estate is liable, if it is the operator
 - Understanding operator
 - Business practitioner or all the obligations environmental license entails?
- KHO 2017:53

Additional liable parties

- Prioritizing is not enough, if the estate has no assets
- Four basic options
 - Enforce judgement abroad against the parent
 - Not viable usually, since the liable party is the subsidiary
 - Unless some prior contractual guarantee
 - Pierce the veil to establish civil liability for the parent
 - Pierce the veil to establish jurisdiction allowing to claim damages from the parent
 - Establish the parent's tort liability

Piercing the veil

- Usually no legislation
 - Case law doctrine in almost every country
- Abusing the corporate form
 - Group structure, inter-corporate relations or shareholder's control
- The Nordic piercing doctrine is rather uniform
 - Using the corporate form in an artificial and reprehensible manner and causing damage to a creditor or the evasion of a legal obligation.

Piercing the veil – making the decision

- Overall assessment
 - Every relevant fact and interest matters
 - There is no authoritative answers to piercing situations
 - Because the situations are essentially a conflict of two authoritative norms
- Piercing decision derives support from principles and legislative purposes behind the norms
 - Polluter pays principle in Norwegian Hempel –decision
 - Enforcing EU directives policy goals in Finnish KKO 2015:17
- Is piercing but a balancing act between principles and purposes?

Piercing the veil – relevant factors

- Control over the corporation and its operation
- Unacceptable motives in establishing the arrangement
- Voluntary or involuntary creditor
- Inadequate resourcing
- Asset siphoning
- Separating assets and benefits

Parent's tort liability

- Some countries have applied looser requirements for tort liability
 - If the claim is based on parent's influence over subsidiary
- Chandler v. Cape Plc. 2012 (United Kingdom)
 - (1) the businesses of the parent and subsidiary are in a relevant respect the same;
 - (2) the parent company has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
 - (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
 - (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.